Background to the Law Commission
1. The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed.

2. The driving principle of all our law reform work is to ensure that the law is fair, modern, accessible and as cost-effective as possible. We believe that, for the law to be fair, it must be capable of being understood by the courts, legal practitioners and citizens.

3. This evidence focuses on three areas of work on which the Law Commission may be able to assist the Committee in advance of our oral evidence on 13 June: consolidation; Special Public Bill Committees; and, legislative standards.

4. Consolidation in particular tends to be a Cinderella subject for busy Government departments tasked with implementing Ministerial priorities. But, it has a significant impact on those using the law. Individuals, businesses and the third sector who have to pay for legal advice will see the inefficiency caused by badly drafted or unconsolidated law reflected in their fees for professional advice. Those who have to use the law without professional assistance will struggle to deal with law that is not clear and easy to follow which in turn can directly impact on the efficient administration of justice when unrepresented parties appear before the courts and tribunals.

5. We also believe that the Special Public Bill Committee process represents an excellent mechanism for implementing legislation efficiently, while still ensuring effective Parliamentary scrutiny.

Consolidation and codification
6. A consolidation Bill combines a number of existing Acts of Parliament on the same subject into a single Act so as to improve the accessibility, clarity and certainty of the law without altering its substance or effect. In the 40 years up to 2006 there were 200-plus consolidation Acts; since then there have been two. We have a statutory duty to promote consolidation but our funding has been reduced, which impacts on our

ability to undertake such work. More generally, it seems to be the case that consolidation is a low priority across Whitehall. We take the view, however, that there is still value to consolidation, a view which was supported in a recent recommendation from the House of Lords Constitution Committee, which recommended the Commission be given the necessary funds to undertake this work\textsuperscript{2}.

7. A number of factors are considered by the Commission when considering undertaking consolidation work, for example:

i. whether the law concerned is suitable for consolidation;

ii. the need for consolidation (essentially, the obstacles it would remove in accessing and using existing legislation);

iii. the complexity and size of the project;

iv. the cost of the work involved and the resources available to meet them;

v. the availability of suitable drafters;

vi. departmental priorities (and the risk of their changing); and,

vii. the risk of changes being made to the law during the life of the project (the prospect of significant changes can prevent us taking a project on)\textsuperscript{3}.

\textsuperscript{2} https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/27.pdf

8. In our report on the *Form and Accessibility of the Law Applicable in Wales* we suggested a method of consolidating existing legislation which we thought had advantages over consolidation as traditionally understood. We called it codification. It differs from straightforward consolidation in two main respects. First, the exercise of drawing the existing law together into one Act is accompanied by a degree of what we called “technical reform”; the effect of the legislation is changed in limited and uncontroversial respects with a view to improving how it operates. Secondly, in the future, when legislating in an area covered by a code, legislators should adopt the discipline of legislating by way of additions to, or amendments of, the code Act, rather than multiplying the number of statutes on the statute book dealing with different aspects of the same subject-matter.

9. This submission focuses on three recent and current projects which we suggest highlight the value of consolidation: Sentencing; Planning Law in Wales; and, Simplification of the Immigration Rules.

**Consolidation Committees**

10. The consolidation procedure is used when a Bill consolidates the law, rather than making changes of policy. A consolidation bill receives parliamentary scrutiny through a joint committee (the Joint Committee on Consolidation, &c. Bills). This avoids long technical Bills taking up time on the floor of the House.

11. There are two principal methods currently in use by which minor changes can be made to the law as part of a consolidation without the Bill requiring scrutiny on the floor of the Houses. One is for the Bill to be accompanied by a report of the Law Commission making recommendations for minor alterations in the effect of the legislation; these recommendations are reviewed by the Joint Committee and either accepted or rejected. The other method is for the introduction of the consolidation Bill to be preceded by pre-consolidation amendments of the existing law effected either in, or under powers conferred by “paving” clauses in an ordinary public Bill. This is the model currently being adopted in the Commission’s project for a Sentencing Code. In the case of sentencing, the need for primary legislation to deliver these pre-consolidation amendments can bring about potential obstacles, for example questions of scope can arise because the subject matter is controversial (whereas the consolidation itself is obviously not).

12. In appropriate cases these methods of consolidation represent a highly efficient use of Parliamentary time. We encourage any efforts being made in Parliament to cement the place of Consolidation Committees and ensure they are given sufficient priority if and when there are Bills for them to consider.
Sentencing

13. In the Sentencing Code project, the Commission started by identifying all the existing law, which runs to some 1,300 pages of primary legislative provision scattered over numerous Acts of Parliament. The intention is to redraft all of that into a single statute, using clear language and other drafting techniques to make it as accessible as possible.

14. In addition, the Commission has also published a report demonstrating that it is possible to remove the difficulty with transitional provisions so as to avoid parallel regimes of sentencing law. For example, in relation to a historic sex offender, it would currently be necessary to identify what the date of the offence was and which particular version of the sentencing legislation was in force at that time. The Commission has identified an opportunity to sweep all that away so that, from the date of commencement of the sentencing code, anyone sentenced would be dealt with under the procedures of that code – subject to the very important caveat that no one can be given a graver penalty than that which would have been available at the date of the commission of their offence. That avoids judges having to look back across various parallel regimes.

15. We are drafting the Sentencing Code as a consolidation Bill. The provisions being enacted are all ones that have previously been subject to Parliamentary debate in the course of their original enactment, and a consolidation Bill cannot itself effect policy reform. All that is necessary to enable this to happen is a very small number of uncontroversial clauses in a programme Bill preceding the consolidation Bill.

16. The challenge with any consolidation or code is to maintain it as the single source of primary legislation. While obviously a matter for Parliament, the key is for there to be a culture whereby any changes to sentencing legislation are made through the sentencing code.

17. The view is sometimes taken that consolidation exercises are a legal nicety, rather than something which can bring about tangible benefits. The Commission suggests this is not so. In the case of sentencing, an independent survey has suggested that around 30% of appeals in the Court of Appeal (Criminal Division) on sentencing involve an unlawful sentence. That is because of a mistake by the judge as to the powers available in relation to the sentencing determination. The human cost can be considerable but, in terms of quantifiable costs, our economic analysis suggests the enactment of the Sentencing Code would bring savings to the criminal justice system of £250m over ten years. There is also widespread interest from Parliamentarians, judiciary, experts
and the public, as demonstrated by our recent consultation exercise, during which the Commission spoke with over 1400 people.

Planning law in Wales

18. Although this project relates to devolved law in Wales, and thus any consolidation bill is a matter for the National Assembly for Wales, the Commission’s view is that this is a good example of an ambitious consolidation project. The impetus for this project is a desire on the part of the Welsh Government to bring about greater clarity in the law so that access to justice is improved for the citizen, particularly those who are not legally represented. Although accessibility is the key component of this work, it may also promote investment, given that costs of legal research and advice should be reduced for those seeking to navigate or use planning laws.

19. We envisage the result of the Planning project will be the emergence in due course of a Wales Planning Bill that will replace all or part of 30 or so statutes, and around 100 regulations, rules and orders. That in turn will form the principal element of a new Welsh Planning Code, which will also contain associated secondary legislation (regulations) and Welsh Government guidance. The Bill would incorporate much of what exists at present, but in a clearer pattern, and in a single place rather than spread over numerous Acts; and it would clarify various points of detail. But it would omit a number of provisions that are of no continuing utility, whose continuing presence makes understanding and use of the planning system unnecessarily difficult.

20. As with sentencing, once a Planning Code has been created, the key is to ensure that it contains all of the statute law on a particular topic as it applies in Wales, and that any future changes would be incorporated into the Code, rather than left as freestanding statutory provisions alongside it.

21. The long-term aspiration of the Welsh Government, we understand, is for a number of areas of the law to be consolidated, with potential future candidates including education, housing and health.

Immigration Rules

22. Although our project on simplification of the Immigration Rules does not extend to primary legislation, it arose out of a submission to our 13th Programme of Law Reform (which also described immigration primary statutes as ripe for a consolidation exercise).

23. The Immigration Rules are crucial in setting out the way in which the Government intends the immigration system as a whole to operate, and affect a large number of individuals seeking leave to
enter or remain in the UK. However, they are widely criticised for being long, complex and difficult to use. They total 1033 pages in length. Statements of changes to the Rules are now frequent and detailed. Between 2012 and 2017, for example, and driven mainly by the introduction of a more detailed and prescriptive style of drafting, the Rules increased in length by nearly 50%.

24. This project will not involve any substantive changes to immigration policy, but will consider not merely how the Rules could be better presented but also how they could be made easier to use by minor technical reforms such as, for example, standardising some of the rules applicable to different categories of immigrant where discrepancies in them have no policy justification.

25. The complexity that has developed in UK domestic immigration law is also attested to by the presence on the statute book of 14 Acts (excluding Acts relating exclusively to nationality law), as well as significant amendments to immigration law in other statutes such as the Crime and Courts Act 2013 and the Justice and Security Act 2013. Each Act amends ones that have gone before and adds new freestanding provisions. Immigration legislation also encroaches on other areas of law where immigration status is relevant, such as social welfare entitlements and housing. We hope there will be appetite in the future for the Law Commission to undertake work on consolidating these primary statutes.

**Special Public Bill Committees**

26. Certain Law Commission bills may be examined by a Special Public Bill Committee in the Lords, pursuant to the special Parliamentary procedure for a Bill which gives effect to recommendations of the Law Commission and has been agreed between the usual channels to be uncontroversial.

27. The Special Public Bill Committee is a committee which is empowered to take written and oral evidence on a Bill. Following taking such evidence, the Committee then considers the Bill clause by clause in the usual way and is able to amend the Bill before reporting it to the House.

28. By way of background, the membership of the committee is proposed by the Committee of Selection, and the government have a majority over the other parties, with remaining places held by the Crossbench members. It has been the practice for the relevant minister and frontbench spokesmen from the other parties to be
members. Any member of the House who is not a member of the committee may attend any public meeting of the committee, and may speak and move amendments, but may not vote.

29. The special procedure was introduced on a trial basis in 2008 and was made permanent in 2010. It was introduced with the aim of “helping to clear the backlog of Law Commission bills awaiting parliamentary consideration and to significantly reduce delays”\(^4\). Since its introduction, 8 Acts have been passed using the special procedure.

30. The term “uncontroversial” has never been defined, but we suggest it means that the proposals in the Bill are acceptable to Government and Opposition Front Benches alike. There is sometimes concern that a Bill making technical changes could be hijacked by amendments raising controversial issues which are technically within scope. This is no doubt true in theory but has not proved a problem in practice since the introduction of the Special Procedure in its present form. Law Commission Bills are always preceded by detailed consultation which is aimed at producing a consensus view. It is worth noting that, for a Bill to be suitable for the Special Procedure, there does not need to be complete unanimity amongst all stakeholders who have commented on the draft Bill.

31. The use of the special procedure is a very helpful mechanism for Parliament, Government and the Commission to take forward reforms because it is designed to enable a Bill to pass through each House taking up very little floor time. By way of example, the recent Unjustified Threats (Intellectual Property) Act 2017 took up less than an hour on the floor of the House of Lords and less than 20 minutes on the floor of the House of Commons, while still retaining thorough Parliamentary scrutiny.

**Legislative standards**

32. The idea of legislative standards has been raised for the UK Parliament before, most recently in the First Special Report of the Constitutional and Legislative Reform Committee. That Committee’s recommendation was rejected by the Coalition Government in 2013. The Law Commission has not taken a view in recent times on this issue in relation to the UK Parliament, however, in Chapter 8\(^5\) of our Form and Accessibility of the Law in Wales report, we recommend the introduction of written legislative standards for Wales – in effect a set of agreed criteria against which the quality of legislation in Wales might be objectively measured. We believe that standards could be of

\(^4\) [https://publications.parliament.uk/pa/ld201314/ldhansrd/text/140512-gc0001.htm#14051218000170](https://publications.parliament.uk/pa/ld201314/ldhansrd/text/140512-gc0001.htm#14051218000170)

great assistance to members of the legislature when scrutinising Bills, and to policy makers when developing them.

33. Perhaps of most relevance to this Inquiry, is the idea of a Legislative Standards Committee. As part of our work, we looked at the different roles that have been performed by legislation advisory committees in New Zealand. Its current Legislation Design and Advisory Committee is a Government body, responsible for drafting and enforcing legislative standards and working with agencies at an early stage of Bill development “to address problems in the basic architecture of legislation and identify potential legal and constitutional issues before bills are introduced”. We were not persuaded that such a committee would represent for Wales the best use of limited resources. Following consultation, we agreed with the concerns expressed by some consultees that such a committee is vulnerable to the political whims of the Government of the day. Moreover, many of the functions it might take on are already within the responsibilities of existing bodies, such as Assembly committees and the Office of the Legislative Counsel. However, the work of the newly constituted Legislation Design and Advisory Committee in New Zealand should be kept under review.

34. More generally, Wales does not currently have a set of formal standards for legislation. Formal standards could be a valuable resource for government officials considering whether and how to legislate. They could also provide a standard measure against which the Welsh Constitutional and Legislative Affairs Committee or others could judge legislation and a powerful tool for achieving better quality legislation.

35. In our evidence to the Welsh Constitutional and Legislative Affairs Committee we suggested that better legislation could be promoted by:
   i. identifying and analysing the underlying policy issues in a way which will highlight clearly the problems to be addressed and possible solutions;
   ii. formulating well thought-through policy objectives, with transparent impact assessment;
   iii. carefully assessing whether a legislative or non-legislative solution would be more appropriate; and,
   iv. setting aside adequate time and resources for pre-introduction public consultation and solution-testing.

36. In addition, the quality of legislation could be improved by:
   i. ensuring that instructions to counsel are comprehensive and clear and reflect fully thought out and agreed policy;
ii. having departments work closely with drafters to ensure that Bills are clear, concise, consistent, unambiguous, and easily intelligible, keeping technical terminology to a minimum;

iii. minimising the need for government to table its own amendments to a Bill after it has entered the legislative process;

iv. making greater use of Keeling Schedules (as part of the explanatory notes) to clarify changes that a Bill makes to previous enactments; and,

v. providing for the clear repeal of any existing enactments that are superseded by the Bill.

37. We took the view that legislative standards should contain guidance on the matters listed above and on policy development and the preparation of better legislation as well as standards for consolidation, codification and the discipline for the preservation of codes.

38. We suggested that the Counsel General should be responsible for developing legislative standards. Insofar as they relate to the design and content of legislation the standards should be reviewed by an Assembly committee and could be formally adopted by the Assembly by resolution in Plenary. Ideally standards should be agreed between the Welsh Government and Assembly.

May 2018